

Excerpt from "Chapter 16. Representing the Executive" by  
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## **MEDIATION OF EMPLOYMENT DISPUTES**

### **1. What Disputes to Mediate.**

An attorney representing employees -- or employers -- should consciously consider mediation in virtually every significant employment dispute that cannot be resolved through direct negotiations.

Familiar surveys have shown consistently that a very high percentage of civil lawsuits settle before judgment, typically more than 90%. And countless disputes settle before they ever mature into lawsuits. Therefore, it is highly likely that any particular dispute will settle at some point; the question usually is, when? Mediation presents the opportunity to ascertain whether such disputes can be settled earlier in the process than may otherwise be the case.

The success rate for mediation depends on numerous variables, such as the ability and techniques of the mediator and the manner in which the mediation was initiated. Empirical evidence suggests that the success rate is much higher when the parties initiate and pay for the mediation, as compared to when the parties are pressured into forum-annexed mediation by a judge or someone else. Reports indicate that court-annexed and agency-annexed mediation programs have success rates in the 50%-60% range, whereas private mediations succeed 80%-90% of the time. (For these purposes, "success" is defined as a settlement satisfactory to the parties.) Sometimes, even when a mediation session fails to result in a settlement at that time, the session may lay the groundwork for a subsequent settlement.

The benefits of mediation include the following:

1. mediation avoids the expense and delay of litigation.
2. mediation engages the parties in creative problem solving.
3. mediation may lead the parties to adopt solutions that a judge could not or would not direct.
4. mediation helps maintain or repair relationships between the parties.
5. mediation provides the parties a "day in court" and an opportunity to vent.
6. mediation allows the parties to learn from their mistakes and take

- corrective measures (e.g., employers learning of poor management practices or errant managers).
7. mediation keeps the dispute and its resolution confidential.
  8. mediation avoids public disclosure of private or sensitive matters

Many employment disputes, including discrimination claims, lend themselves to mediation. The following types of situations are especially well suited for mediation:

1. Where the employee still works for the employer: the parties may be able to maintain or re-establish a good working relationship, which is obviously hard to do when the parties are engaged in adversarial litigation.
2. When private or sensitive matters are involved, such as sexual harassment claims: the parties, especially the employer and the alleged harasser, often prefer to discuss and resolve such matters in the confidential context of a mediation, without the embarrassment or discomfort of public proceedings.
3. When “reasonable accommodations” are sought under the Americans with Disabilities Act: the employee and employer, who are most familiar with the employee’s condition and abilities and with the functions and nature of the job, can try constructively to find effective ways for the employee to do the essential functions of the job.

Whatever the nature of the dispute, the parties and their attorneys must have a good faith interest in trying to resolve the dispute on reasonable terms. If either party lacks such good faith going into the mediation, the chances of a resolution are small, though not zero.

Some attorneys are reluctant to suggest mediation because they fear that doing so will suggest weakness. This is an overblown concern. Most experienced litigators recognize that a very high percentage of cases settle and that litigation is a costly and risky process for all parties. Accordingly, an employee’s attorney should not be afraid to open the door to settlement discussions, including possible mediation.

Mediation does have some drawbacks. When it does not succeed, the parties may have incurred some expense and delay in the process, though these are generally relatively minor in the context of a litigated dispute. Moreover, when a party (or party’s attorney) does not engage in mediation for the right reasons (i.e., with the good faith intention to try to reach a fair and reasonable resolution), then the other party may feel – with some justification – used and abused, especially if it appears that the other party was engaging in mediation for devious reasons (e.g., to stall proceedings or to get some “free discovery”). Fortunately, such conduct is uncommon, especially as attorneys and their clients learn the advantages of giving mediation a good faith try.

For both employees’ and employers’ attorneys, a common problem is convincing the other side to try mediation. This is especially problematic when the opposing attorney is unfamiliar with the process or is suspicious of the motives of the person

suggesting it. A good way to address the former problem is to refer the opposing attorney to other attorneys on the same side of the aisle who have experience with the process; almost invariably, this works to convince the attorney that mediation is an effective device for employment disputes. The latter problem requires convincing the other attorney that you are proceeding in good faith and that you have no interest in wasting your (or your client's) time and money on a pointless exercise. In any event, most attorneys, once they understand the process, realize that they have little to lose by trying it.

Concerns of the type mentioned above are reduced when mediation is required or "suggested" by a court or agency or by a company's internal dispute resolution procedure.

## **2. When to Mediate.**

As a general principle, the best time to mediate is "sooner rather than later." Of course, there are exceptions.

The primary tension here is between cost and information, although factors can matter, too (e.g., determination of a key legal issue). Given that most cases do settle at some point, money spent on litigating (e.g., attorneys' fees, deposition costs, and expert fees) can make it harder to settle later rather than sooner. Money spent by the employer on litigating could be used to supplement the settlement "pot." Money spent by the employee (or employee's counsel) on litigating can push up the amount needed to settle the case; this is true whether the employee's attorney is working on an hourly, contingency, or other arrangement. Too often, the primary beneficiaries of litigation are the lawyers, particularly defense attorneys who are paid on an hourly basis.

Some employment attorneys assert that mediation is inappropriate until the eve of trial because the parties won't be serious about settlement until they are "on the courthouse steps." Although that is certainly true sometimes, empirical evidence strongly suggests that, at least in employment cases, that view is unfounded. In fact, given some modicum of good faith and reasonableness, the vast majority of employment cases that go to mediation – generally long before trial – do settle.

Some employment attorneys assert that mediation is inappropriate until after substantial discovery has been completed. Plaintiffs' attorneys say that they need certain information before they can properly evaluate the settlement value of the case. For example, in a discrimination case, the attorney may need comparative information about other employees. Defense attorneys say that they need to take the plaintiff's deposition before considering mediation; and plaintiffs' attorneys sometimes say they need one or two key depositions first. Generally, though not always, these views are unwarranted. Full-blown discovery is not always needed to evaluate the case. In any event, parties can and do often condition participation in mediation on the other side supplying essential information beforehand. Thus, the employee's attorney might agree to mediate if and only if the employer provides certain information, such as the employee's complete

personnel file, designated correspondence or other documents, and files and information about certain other employees. Moreover, during mediation sessions, as the need for certain information becomes evident, the parties can arrange for the information to be supplied; it is not unusual to adjourn a mediation session pending the disclosure of such information.

Another factor favoring early mediation is that, during litigation, parties' positions sometimes harden, particularly if they believe the other side has abused them or the process during the litigation. For example, a plaintiff who has endured a brutal deposition may feel that that the worst is over and that he or she wants to reciprocate by causing pain to the other side. Or an employee of the defendant employer who has been accused of serious discriminatory, harassing, or other heinous behavior may seek vindication. Early mediation can mitigate such developments.

### **3. The Mediation Forum.**

Many courts have court-annexed mediation programs under which litigants can be required to participate by court rules or by order of a judge or magistrate. The Equal Employment Opportunity Commission and many fair employment practice agencies have mediation programs under which the parties might be asked to participate in mediation. These programs have several advantages: they cost the parties nothing (except of course attorneys' fees); they present the occasion for mediation without either party having to ask for it; and the mediators are sometimes knowledgeable about employment law. On the other hand, the caliber of the mediators in such programs varies widely. Most court-annexed programs (and many agency programs) rely on volunteer attorneys to serve as mediators. While such volunteers are generally able and experienced litigators and have had some mediation training, few are expert mediators; as discussed below, the mediator is the key to a successful process.

Many company-established dispute resolution procedures include mediation as an option or as a "mandatory" step in the process. Fortunately, under such programs, the attorneys generally have the opportunity to participate in selecting the mediator and the company pays most or all of the cost. In fact, under some programs, the company provides an allowance of a certain amount that the employee can use for attorneys' fees.

Many mediations are conducted using professional independent mediators. Most areas of the country now have access to such mediators. JAMS has offices in many cities, and most cities have firms (such as ADR Associates in New York City and Washington) and individuals who specialize in mediating employment disputes; the American Arbitration Association and the CPR Institute for Dispute Resolution also provide mediators. Many professional mediators travel readily to the location of the parties. Generally, professional mediators are the best. But, of course, they are the most expensive mediation providers; in New York City, such mediators typically charge \$200 to \$500 per hour. If the dispute involves substantial claims, such private mediation is generally the best approach.

#### **4. The Mediator.**

An effective mediator is essential. Indeed, a good mediator is the single most important factor in successful mediations. Not everyone can be a good mediator; retired judges do not necessarily make good mediators, though some are. The most important characteristics for a mediator are good interpersonal and listening skills, creative problem-solving skills, and credibility with the parties. Substantive knowledge of the law is very helpful, but not as essential.

Mediators' styles vary. The most common approaches are typically referred to as "facilitative" and "evaluative." Under the facilitative approach, the mediator serves as a facilitator for the exchange of views and positions between the parties. This may include, for example, encouraging parties to "vent" their feelings and express their needs and wants. It may also include helping each side understand better the points of views of the other side and helping the parties find mutually beneficial solutions. Under the evaluative approach, the mediator analyzes the parties' legal, evidentiary, and factual positions and explains to the parties and their attorneys the strengths and weaknesses of each party's case. While some mediators tend to use more of one approach than the other, most successful mediators use some of both. Typically, such a mediator will spend considerable time at the beginning of the mediation on the facilitative approach and then gradually become more evaluative as the mediation unfolds, with some movement back-and-forth between approaches.

In selecting a mediator, ask the prospective mediator about his or her experience with cases of the type involved, and ask for references. A good source of information is other employment attorneys. For employees' attorneys, calls to colleagues in the National Employment Lawyers Association can be especially helpful.

#### **5. Pre-Mediation Discussions and Preparation.**

When the mediation is not pursuant to a court or agency program, the attorneys for the parties will need to discuss and agree on who to use as the mediator, where the mediation will take place, who will attend the mediation from each side, and who will pay for the mediator.

Assuring that the right people attend from each side can be essential to the success of the process. Obviously, the employee must attend. The employee's attorney may also recommend that the client bring his or her spouse or "significant other." Not only can that person provide valuable support at the mediation, but he or she can be involved in the decision-making process. This reduces the risk that, after an agreement is reached during the mediation, the spouse or significant other will disagree with the outcome and either pressure the employee to change his or her position or criticize the employee for the outcome. In the alternative, a member of the employee's family or a close friend may be helpful to the employee during the process. Who should attend for the employer is discussed below.

Generally, the starting point for discussion on who pays for the mediator is an equal sharing. The employee's attorney often can and should try to get the employer to pay more than half of the cost, up to 75% to 90%. This is often possible, especially when the employee cannot afford the cost and the employer is genuinely interested in trying to settle the case. The employee's attorney usually does not try to get the employer to pay 100 percent of the cost, on the theory that it is appropriate and desirable for the employee to invest financially in the process. In any event, whatever the cost-sharing arrangements are at the outset, the employee's attorney often can succeed, if the case settles during mediation, in shifting all of the cost to the employer as part of the settlement.

Attorneys should prepare themselves and their clients thoroughly for mediation. While the commitment of time and energy need not approach that of preparing for trial, neither should the parties "wing it." The better prepared you are, the more likely that you will have a satisfactory outcome.

Preparation includes educating the client about the process - explaining how mediation works, what the mediator's role is, how the process will unfold, how the attorneys will conduct themselves, how the parties are likely to conduct themselves, how long the process might take and so forth.

The attorney and client should also discuss in detail the potential remedies achievable through litigation and through negotiation. With the client's assistance, the attorney should prepare a "damages chart" addressing each element or recoverable damages. In appropriate situations, an actuary or economist may be retained to prepare a comprehensive report on damages. Such a damages chart or report will help the attorney and client understand and evaluate their negotiating position. Moreover, it can be shared with the mediator and with the other side before or during the mediation, serving as a checklist for discussion purposes.

The attorney and client should discuss their goals for mediation, including the client's wants, needs, and interests. They should talk openly and about what the client hopes to achieve through negotiation. They should also discuss the alternatives to a negotiated resolution, including the costs, time, and risks involved in litigation. Although the attorney and client should discuss general ranges of financial recovery they should not fix on any "bottom line" positions or predetermined lines of approach. Flexibility is important. Parties must be free to respond to information, position, and arguments that arise during the mediation.

The employee's attorney should seriously consider having the employee personally make a substantive opening statement. This is the client's opportunity to tell his or her "story" directly to the other side. Having the client make this opening statement gets the client actively involved in the process, both before and during the mediation session. In addition, often, a sincere, credible and strong opening statement can have a substantial impact on the other side's view of the employee, the employee's case, and/or the appropriateness or remedial measures. Thus, well before the mediation, the employee's attorney should discuss with the employee the outlines of what he or she

might say, and ask the employee to prepare a proposed statement (whether in outline form or in text). Then, shortly before the mediation, the attorney and the employee should review what the employee is planning to say.

Generally, the statement should include, from the client's perspective, what happened, the effect of the events on the client (and maybe the client's family), and why the client deserves remedial action. The statement should not directly address legal issues and generally should not include specific demands or terms. The length of the statement depends on the circumstances, but 15 to 20 minutes is usually appropriate. Although the statement should be in the client's own words, the attorney, after reviewing the statement, should suggest additions, deletions, and changes to make the statement more effective.

## **6. Pre-Mediation Conference.**

Typically, the mediator will conduct a pre-mediation telephone conference with the attorneys. In that conference, the mediator will outline the procedure and answer any questions the attorneys may have. An important aspect of this conference, from the perspective of the employee's attorney especially, is to assure that the employer sends someone to the mediation who has sufficient authority to settle the case. Otherwise, the process can become blocked or stalled if the company representative lacks sufficient authority. It is a poor practice for the representative present to have to call someone who has not been part of the process to explain why the company should pay more money or make some other arrangement.

Also during that conference, the mediator will discuss the parties' pre-mediation written submissions. The mediator can understand the case better and more quickly when the parties have supplied such submissions. Given that the parties and their attorneys will have ample opportunity during the mediation to make whatever points they want to make to the mediator and to address any issues that arise, the submissions need not be comprehensive; they should be as short and simple as possible. The object is merely to acquaint the mediator with the background of the dispute, the status of any litigation and settlement discussions, key factual issues and relevant documents, and important legal issues. The mediator will ask the attorneys whether they want to share their submissions with the other side. Sometimes, the attorneys will submit some materials that are shared and others that are not.

The conference will also include a discussion of the mediation agreement that the parties and their attorneys will be asked to sign before or at the mediation. This agreement will set forth certain key aspects of the mediation, including the fact that the parties will keep the contents of the mediation completely confidential; no one can use mediation communications, including factual positions and settlement offers, in any subsequent proceedings.

Finally, in the context of private (e.g., non-court or agency) mediation, the mediator and the parties will discuss the mediator's fees.

## **7. The Mediation.**

For most mediations of employment disputes, the parties and their counsel should plan on a full day for the session. Virtually all such mediations take at least several hours. Indeed, it is advisable not to make any plans for the evening of a mediation, if at all possible, because many do run into the evening hours.

The mediator invariably opens the session with preliminary remarks about the process and invites questions from the participants. The participants are urged to listen carefully and patiently to the other side's statements, with an open mind. And the parties are reminded of the confidentiality of the process. Then, the parties are invited to make opening statements; the employee usually goes first. As discussed earlier, some employee's attorneys have their client make a substantive opening statement. Most defense attorneys prefer to make the statements for their side, rather than having their clients speak. (In fact, many defense attorneys apparently instruct their clients not to speak at all during joint sessions.) After the opening statements, the mediator may ask the parties whether they have any additional comments or have any questions, and the mediator may ask some questions to clarify certain issues.

At that point, the mediator usually begins caucuses with the parties and their counsel in separate rooms, typically beginning with the employee's side. From that point on, most of the rest of the mediation probably will consist of separate caucuses, with the mediator shuttling back-and-forth between the caucus rooms. The mediator may meet separately with just the attorney for one party or the attorneys for all parties. Deciding with whom to meet and in what order is part of the mediator's art. Usually, the separate groups do not get together again until the end of the mediation, perhaps to shake hands over a settlement and to work out the language of a written agreement.

If the parties reach an impasse in negotiations, the mediator may suggest a "mediator/s proposal." Essentially, this is a proposal that the mediator makes to the parties on a "take or leave it" basis to try to bridge the gap. The mediator tells each party to say "yes" or "no" to the proposal. If both parties say "yes," there is a settlement. If either party says "no," there is no settlement. Importantly, in that situation, the mediator does not tell either party what the other side answered. That way, if one party said "yes" and the other said "no," the second party would not learn that the first party said "yes" to the proposal.

Sometimes the inability to reach a settlement may occur because of the unavailability of certain relevant information; this might include information on the treatment or compensation of other employees or information about aspects of the employee's damages (such as proof of other earnings or the employee's medical records). Or the parties may decide that they need a court ruling on some legal issue or that they need to await the outcome of some litigation event, such as a summary judgment motion. Sometimes, a party needs to consult with someone who is unavailable at the time. In



such circumstances, the parties may agree to adjourn the mediation to another date, pending the further developments.

If the mediation session adjourns without a settlement, some mediators take the initiative to follow up with the parties later to determine whether further communications might be helpful. With or without such intervention, many cases that do not settle during the mediation session do settle later, at least in part due to the progress made during the mediation.

## **8. The Settlement Agreement.**

When a settlement is reached during mediation, the parties should prepare and sign a binding agreement. Leaving the mediation without a signed (or at least initialed) agreement risks a broken deal; once the parties leave, “buyer’s remorse” may set in and the deal could fall apart.

The types of agreements signed at the end of mediations range along a continuum of formality and finality. On one end is a simple “term sheet” initialed by the parties, subject to further negotiation of some terms and preparation of a formal document. On the other end is a formal, final agreement signed by the parties. In between might be a simple binding agreement, signed by the parties, outlining the terms and types of provisions to be included in a more definitive agreement to be prepared. The further along this continuum that the agreement is, the better.

Sometimes, a formal final agreement is not possible, due to unresolved issues, absence of a prototype agreement as a foundation, absence of the equipment to prepare the draft, or simply lack of time, energy, or will at the end of a tough mediation session. Every effort should be made to prepare the best agreement that the circumstances allow. The more issues and language that remain open, the greater the risk of a significant delay in finishing the deal and the greater the risk of the deal falling apart.

One way to maximize the possibility of a formal final agreement is for counsel to bring a laptop containing a prototype agreement, including typical provisions and optional clauses. An optimistic counsel might even have in the laptop a tailored agreement ready to be modified to reflect the actual deal.

The settlement agreement should include a dispute resolution provision. Typically such a provision will provide that, if a dispute arises, the parties will mediate the dispute with the same mediator and, if such mediation fails, will submit the dispute to arbitration. The arbitration provision should specify the arbitrator or the process for selecting the arbitrator, which may consist of referral to an organization to administer the process. The arbitration provision should also address such matters as the location and the governing rules for the arbitration.

The employee’s attorney should also include a provision that, in arbitration, the arbitrator will have the authority to award attorneys’ fees and cost to the prevailing party.

Absent such a provision, the employee may have to absorb the attorneys' fees and costs incurred in enforcing the agreement. Note that the suggestion is to give the arbitrator the authority to award fees and costs, not the obligation to do so; if the employee loses the arbitration, the arbitrator probably would not make such an award against the employee unless the employee's position was frivolous or in bad faith.

Whether an oral agreement or a signed "term sheet" is an enforceable agreement depends on the intention of the parties and is governed by general principles of contract law. Importantly, under the Older Workers Benefit Protection Act, an employee's rights under the Age Discrimination in Employment Act cannot be effectively released unless the employee is allowed up to 21 days to consider the release agreement and has had seven days to revoke the release after signing it; the revocation period cannot be waived.

Often, the mediator is available and able to help the parties resolve any issues or disagreements that arise during the drafting of the full agreement. Notably, however, standard mediation agreements provide that the parties will never call the mediator as a witness in any dispute over the settlement or otherwise cause the mediator to disclose any aspect of the mediation process or the settlement.

The agreement signed at the end of the mediation should also be signed by counsel for the parties to show that they represented their clients during the negotiation and drafting of the agreement and that they approve the form of the agreement.